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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 407

JOE LASH,

Petitioner,

vs.

STATE OF ALABAMA.

PETITION FOR RECONSIDERATION OR REHEARING.

JOSEPH A. PADWAY,
HERBERT S. THATCHER,
MERWIN KOONCE,
Counsel for Petitioner.

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To the Honorable the Justices of the Supreme Court of the United States:

Petitioner respectfully represents to this Honorable Court as follows:

1. On September 30, 1943, Petitioner filed a petition for writ of certiorari in the above styled cause with the Supreme Court of the United States and filed a brief in support thereof.

2. On October 26, 1943, the Respondent, State of Alabama, filed a brief in opposition to such petition for writ of certiorari.

3. On November 8, 1943, this Honorable Court issued an order denying said petition for writ of certiorari. No decision, memorandum or comment accompanied said order, nor were any cases cited in connection with such denial.

4. This petition for reconsideration constitutes a final appeal for relief from a statute that has been and will be used to restrain the exercise by working people of basic constitutional rights, to their grievous injury in the State of Alabama, and is made for the purpose of pointing out additional circumstances and to stress arguments not previously stressed but which might induce a reconsideration in view of certain contentions raised in the reply brief of the Respondent. These circumstances and arguments are as follows:

A. The statute under which Petitioner was convicted (Section 3447, 1923 Alabama Code), outlawing combinations to prevent by unlawful means other persons from carrying on any lawful business, was passed at the same time and constitutes a companion statute to the statute forbidding any person from interfering by unlawful means with any lawful business. The latter statute was declared unconstitutional in *Thornhill* v. *Alabama,* 310 U. S. 88. The present statute constitutes as great if not a greater threat to and restraint upon the right of picketing and free communication than does its counterpart struck down in the *Thornhill* case. It offers the possibility of being used, and has been used, as a dragnet or catch-all measure effectively to restrain peaceful picketing in the State of Alabama. In addition to the instant case, there are twenty other convictions in the State under the statute, arising out of picketing in furtherance of a labor dispute, which convictions have been affirmed by the State Supreme Court and await the disposition of the present case.

B. The reply brief of the Respondent has incorrectly stated the principles relating to the conclusiveness of decisions by state supreme courts upon federal constitutional issues by inferring that the State Supreme Court's construction of the statute in question is conclusive as to its constitutionality under the Federal Constitution. The state

courts, of course, are final arbiters only of the meaning and application of state statutes and of their constitutionality under state constitutions; state courts cannot conclusively determine whether the state statutes are in conflict with the Federal Constitution under the meaning and application given by the state court. As stated in *Henry J. Beal, County Attorney,* v. *Missouri Pacific Railroad Company,* 312 U. S. 45, 85 L. Ed. 577:

> "The state courts are the final arbiters of their meaning and appropriate application, subject only to review by this Court if appropriately challenged on constitutional grounds."

See *Howard* v. *Davis,* 209 Ala. 113, 95 Sou. 354, in which the Supreme Court of Alabama recognized the foregoing proposition.

In the present case the decision of the Alabama State Supreme Court held that the statute was to be construed in a certain way, and that its construction was not in conflict with the Federal Constitution. The construction given by the State Supreme Court to the statute was simply this: That a combination to interfere with the business of another without "just cause or legal excuse for so doing" meant a combination to interfere with the business of another "by unlawful means" or "unlawfully". Petitioner is bound by this construction, but he is not bound by the further holding of the State Court that under this construction or by reason of this construction the statute is not in violation of the Federal Constitution. The State Court declared that unlawful conspiracies or conspiracies using unlawful means, or conspiracies acting unlawfully which interfered with a business could constitutionally be prohibited by the State, but at no time was it made clear, either in the decision of the State Supreme Court or in the decision of the lower court or in the accusation or information under which Petitioner was indicted, whether the conspiracy was unlawful by virtue of the fact that the conspiracy was to engage in picketing

which interfered with the conduct of a lawful business, or because Petitioner was to engage in violence which interfered with a lawful business. Contrary to the statement made in the opposition brief of the Respondent, the trial court made no finding of violence whatsoever, the trial court merely stating that "there was ample evidence to support the judgment finding the appellant guilty" of a violation of the statute.

Petitioner has been indicted, tried, convicted and sentenced to imprisonment for an offense the nature of which he has no knowledge even as of the present day. It might be that the statute outlawed combinations to interfere with a business by picketing, or it might be that the statute outlawed combinations to interfere with business by violence. In either event, the statute is unconstitutional. If to outlaw interferences with business by picketing, it is clearly bad under the *Thornhill* case; if to outlaw interference by violence it is equally unlawful under the *Thornhill* case, and under the doctrine in *Lanzetta* v. *New Jersey*, 306 U. S. 451, both because of the fact that the statute does not specify that violence is an element and thus constitutes a pervasive threat to all picketing, and because of the fact that the State fails to inform those accused under it of the nature of their crime.

The fact that the statute might be applied in a way that would be constitutional is, of course, by no means conclusive as to its constitutionality. There can be no argument with the declaration of the State Supreme Court that the State can constitutionally outlaw combinations to interfere with a lawful business by the use of violence, but exception can be taken against any determination by the State Supreme Court that the instant statute is such a statute or accomplishes such a result. If the decision of this Court in the *Thornhill* case means anything, it means that where communication of the facts of a labor dispute is involved, such communication cannot be previously restrained or im-

paired by catch-all language which would on its face include the permissible with that which lawfully could be condemned. Can there be any possible argument that a statute which simply recites that it is a crime to combine to interfere with another's business "unlawfully" or "by unlawful means" does in fact offer a pervasive threat to all picketing; that under such a statute persons desiring to communicate the facts of a labor dispute to the public might very well hesitate to do so where the operation of the business was thereby interfered with; or that such a statute "readily lends itself to harsh and discriminatory enforcement by local prosecuting officials"? (*Thornhill* v. *Alabama, supra.*) When police legislation "results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview" (*Thornhill* v. *Alabama, supra*), then such legislation must be stricken as an interference with basic constitutional rights. The fact that the legislation could reasonably be applied to restrictions on conspiracy to commit violence is immaterial if the legislation could, as in the present case, with equal reasonableness be applied to restrictions on peaceful picketing which interfered with the conduct of a business. It must be remembered that, where the exercise of civil liberties is involved, the State is not accorded its usual freedom in dealing with unlawful conduct:

> "Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations, which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." (*Thornhill* v. *Alabama, supra.*)

In the present case one question continues to remain unanswered: If it is violence in labor disputes with which the State is concerned under the present statute, where or in what manner has the State so indicated in the present

prosecution? Surely, the complaint or information against Petitioner does not so specify, neither does the statute upon which the charges were predicated. Finally the finding against Petitioner in no way specifies that Petitioner had conspired to commit violence, being merely a general one of guilty.

It is respectfully submitted that even under the construction of the statute given to it by the Alabama State Supreme Court the statute contravenes rights under the Federal Constitution. If permitted to stand, it will undoubtedly constitute, as it has constituted in the past, a restraint upon all picketing, and will be used as a dragnet for discriminatory enforcement by local prosecuting officials who may have an anti-labor bias. Further, it will afford encouragement to the passage of similar catch-all legislation in other states where anti-labor prejudice has manifested itself.

WHEREFORE, Petitioner respectfully prays this Honorable Court that it reconsider its denial of the writ of certiorari heretofore filed in this matter and that upon reconsideration it grant the petition as prayed therein.

Respectfully submitted,

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This petition is presented in good faith and not for purposes of delay.

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